LEGAL UPDATES

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# SAFE Act Compliance for Financial Institutions

Service

Banking & Finance

## Overview

The final rules to implement the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (the "Act") were issued through the joint action of six federal agencies on July 28, 2010[1]. The Act mandates that the agencies establish a registration system for residential mortgage loan originators who are employees of federally regulated institutions.

The stated purpose of the Act is to enhance consumer protection and reduce fraud in the mortgage loan industry by registering mortgage loan originators and maintaining certain information about them in a new Nationwide Mortgage Licensing System and Registry (the "Registry"). The Registry will be administered by the Conference of State Bank Examiners and the American Association of Residential Mortgage Regulators. However, the Registry will not screen or approve registrations received from mortgage loan originators. Therefore, each covered financial institution must establish policies and procedures to ensure compliance with the Registry's requirements.

This article reviews the scope of the Act and the new regulations, including which financial institutions, employees and financial instruments are covered by the rules, and the registration requirements to which the institutions and individuals must adhere. The concluding section sets forth several suggestions for institutions to consider when preparing to implement the new rules.

## Covered Institutions

The rules are effectively identical for all "agency-regulated institutions" with functional regulation as follows:

The OCC rules apply to national banks, federal branches and agencies of foreign banks, and their respective operating subsidiaries

The FRB rules cover state member banks, their subsidiaries that are not functionally regulated within the meaning of the Bank Holding Company Act, and the branches, agencies of foreign banks (not covered as Federal foreign banks or branches) and commercial lending companies owned by foreign banks

The FDIC rules apply to insured state non-member banks and their subsidiaries (except brokers, dealers, persons providing insurance, investment companies, and investment advisers)

The OTS rules will apply to savings associations and their operating subsidiaries

The FCA rules cover Farm Credit System institutions that originate mortgage loans

The NCUA rules apply to all federally-insured credit unions

It is important to note that the rules do not cover bank or savings association holding companies or their non-depository subsidiaries. Employees of those entities must comply with the licensing and registration requirements of the various states.

## Covered Employees

The rules define a mortgage loan originator as an individual who takes a residential loan application and offers or negotiates the terms of the application for compensation or gain. The definition excludes (i) individuals who perform solely administrative or clerical tasks on behalf of a mortgage loan originator; (ii) individuals who perform solely as real estate brokers and are licensed or registered under applicable state laws, unless the individual is compensated by a lender, mortgage broker, or mortgage loan originator, or an agent for any of the foregoing; or (iii) an individual or entity solely involved in extensions of credit related to timeshare plans.

A *de minimis* exception also exists for any individual who has never been registered or licensed as a mortgage loan originator and who, during the past 12 months, did not act as a mortgage loan originator for more than five residential mortgage loans. However, two significant caveats apply to this exception (e.g. originating a sixth loan in 12 months). First, the individual must register *before* engaging in a transaction that exceeds the exception limit. Second, a covered institution is prohibited from engaging in any practice that could be viewed as attempting to evade the limits of the *de minimis* exception.

## Residential Mortgage Loans

A residential mortgage loan is broadly defined to include any loan primarily intended for personal, family or household use that is secured by a mortgage, deed of trust, or other equivalent consensual security interest. The rules specifically include refinancing, reverse mortgages, home equity lines of credit (HELOC) and other first and additional lien loans.

The definition includes loans that may not typically be considered mortgage loans, including loans made by individuals who are not thought of as mortgage loan originators. For instance, the rules cover HELOC and home improvement loans that may originate from the installment lending or other area of an institution as opposed to a mortgage loan subsidiary or department. Likewise, taking a junior lien on a residence as additional collateral for other personal loans, such as credit card, may be covered as residential mortgage loans if they otherwise meet the definition. And the employees making the loans may qualify as mortgage loan originators, which could subject them to the registration requirements if they exceed the *de minimis* standard.

**Registration Requirements**

Mortgage loan originators of covered institutions must obtain a unique identifier, register with the Registry and maintain that registration. The unique identifier permanently identifies each loan originator and facilitates tracking information related to their employment history and any disciplinary or enforcement activity initiated against them. The information will be maintained and publicly available through the Registry.

Covered financial institutions must adopt policies to require that employed mortgage loan originators obtain the unique identifier, register, and maintain the registration with the Registry pursuant to the annual registration requirements.

**Required Employee Information**

Covered institutions must require each employee to submit, or submit on their behalf, the following information:

1. Identifying information, including name and former names; home address and contact information; principal business location and contact information; social security number; gender; place and date of birth
2. The employee's financial services-related employment history for the 10 years prior to the registration date and the current employment dates
3. Information concerning any convictions for crimes involving dishonesty, breach of trust or money laundering against the employee or any organizations controlled by the employee, or any agreements to enter into a pretrial diversion or similar program in connection with any such offense

 

4. Information concerning any civil judicial actions against the employee in connection with financial services-related activities, including dismissals with settlements or judicial findings that the employee violated financial services-related statutes or regulations
5. Action or orders by a state or federal agency or foreign financial regulatory agency that:
    i. found that the employee made false statements or omissions, was dishonest, unfair or unethical, was involved in a violation of a financial services-related regulation or statute, or was the cause of a financial services-related business losing its license or authorization to do business;
    ii. were entered against the employee in connection with a financial services-related activity;
    iii. denied, suspended or revoked the employee's registration or license to engage in a financial services-related activity, or disciplined or restricted the employee in connection with financial services-related activities; or
    iv. barred the employee from association with an entity or its officers regulated by the agency or authority, or from engaging in a financial services-related business.
6. Final orders issued by a state or federal regulatory agency based on a violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct
7. Revocation or suspension of the employee's authorization to act as an attorney, accountant or a state or federal contractor
8. Information concerning any customer-initiated financial services-related arbitration or civil action against the employee that required action, including settlements, which resulted in a judgment
9. Copies of the employee's fingerprints, in digital form if practicable, and any appropriate identifying information, for submission to the Federal Bureau of Investigation and any governmental agency or entity authorized to receive such information in connection with a state and federal criminal history background check. Fingerprints that are less than three years old satisfy this requirement.

The registration or renewal must include the employee's authorization to obtain the required background information and their attestation to the accuracy of any information they submit either to the Registry or the institution to satisfy the rules. The employee must also authorize the Registry to make certain information available to the public.

Although the employee's information may be submitted by the employee or the institution on behalf of the employee, the issue is somewhat academic given that the institutions are required to establish procedures to insure the accuracy of the information provided. The institution must designate employees who will be responsible for submitting the required information and who cannot themselves be mortgage loan originators.

### Required Institution Information

Institutions employing mortgage loan originators are required to submit the following information to the Registry:

1. Institution name, main office address and contact information
2. Tax identification number (EIN)
3. Research Statistics Supervision and Discount (RSSD) number issued by the FRB
4. Identification of the primary federal regulator
5. Name and contact information of the individual authorized to act as the institution's primary contact with the Registry
6. Names and contact information of the individuals (must not be mortgage loan originators) authorized to submit information on employees to the Registry
7. If the institution is a subsidiary of an agency-regulated institution, and if so, the RSSD number of the parent institution

The individuals authorized to act on behalf of the institution and submit employee information must also attest to their identity, authorization and accuracy of the submitted information.

Information submitted to the Registry must be updated within 30 days of any changes, including if the mortgage loan originator ceases to be an employee of the institution. All institution information must also be renewed annually.

### Required Policy and Procedures

Institutions that employ one or more mortgage loan originators must adopt written policies and procedures designed to assure compliance with the rules. The policies and procedures must be appropriate to the size, nature, scope and complexity of the institution's mortgage lending activities. At a *minimum* the policies and procedures must:

1. Establish a process to identify mortgage loan originators

 

2. Require that mortgage loan originators receive training on the Act's requirements and the rules
3. Establish procedures to comply with the unique identifier requirements
4. Establish procedures to confirm the adequacy and accuracy of employee registrations, including updates and renewals
5. Establish tracking systems to monitor compliance with registrations and renewals
6. Provide for independent compliance testing on at least an annual basis by bank personnel or an outside party
7. Provide for appropriate corrective action for employees who fail to comply with registration requirements or the institution's related policies and procedures, including "....prohibiting such employees from acting as mortgage loan originators or other appropriate disciplinary action"
8. Establish a process to review covered employees' criminal history background reports, undertake appropriate action consistent with applicable federal law (including Section 19 of the Federal Deposit Insurance Act), implement regulations concerning the reports and maintain records of the reports and actions taken in relation to covered employees
9. Establish procedures designed to ensure that any third parties with which the institution has an arrangement related to mortgage loan originations complies with all requirements under the Act and the rules

### Use of Unique Identifier

Institutions must make each mortgage loan originator's unique identifier available to consumers in a practicable manner. A registered mortgage loan originator is required to provide their unique identifier to a consumer upon request, before acting as a mortgage loan originator, and through the initial written communication with the consumer, whether on paper or electronically.

### Effective Date and Implementation Period

The rules go into effect on October 1, 2010. There is a 180-day implementation period which will commence on the date that the agencies provide public notice that the Registry is accepting initial applications.

### What This Means To You

The Act and rule require an entirely new compliance function for your institution and compliance personnel. Here are some suggestions:

Begin to educate covered individuals and compliance personnel concerning the Act's requirements and the rules

Institutions with an established mortgage loan area or mortgage loan subsidiary should begin to identify mortgage loan originators covered by the rules, based upon job descriptions or functions

Institutions should also begin to identify the types of loans covered by the rules. Loans made in the mortgage loan division or subsidiaries are likely typical first mortgage loans for the purchase or re-financing of a primary residence and are obviously covered by the rules. However, as previously noted, loans made in other areas may also be covered. HELOCs, bridge loans, home improvement loans or loans to provide additional collateral may be considered mortgage loans. And the employees who make those loans may be deemed mortgage loan originators subject to registration.

Institutions do not need to rely on the *de minimis* exclusion. Registration is permissive and employees who make five or fewer loans may still want to register. There will probably be a lag time associated with registration. If the need arises because of terminations, illness or other factors, you will want to have employees who can step in.

If you do not currently fingerprint new employees, you will need to determine how to accomplish that task. Employees in your Security or Human Resources areas can be trained or arrangements can be made with local law enforcement agencies. The fingerprints must be submitted to the Federal Bureau of Investigation to complete the criminal background check.

Start the process of writing the required policies and procedures, which are new and will appear on the examiners' checklists.

Determine how you will meet the independent testing requirements and where and how your records will be maintained.

Give particular consideration to the implications of discovering that a current employee or candidate for employment has a criminal history involving dishonesty or other fraudulent activity. The regulation and accompanying commentary suggest that this type of history will bar employment as a mortgage loan originator and could subject the individual to other disciplinary action. Examine your current employment policy in that regard. You must have policies and procedures in place to address this possibility.

Review the Act and rules with your board of directors. The board should approve all policies and procedures adopted pursuant to the Act, and should receive at least annual reports on actions taken.

Husch Blackwell's team of experienced counselors is available to assist you in navigating through all of these new compliance requirements. We continue to follow developments in this area of the law and we are available to discuss these issues at your convenience.

[1]The six agencies (the "Agencies") include the Office of the Comptroller of Currency (OCC); Board of Governors of the Federal Reserve System (FRB); Federal Deposit Insurance Corporation (FDIC); Office of Thrift Supervision (OTS); Farm Credit Administration (FCA); and National Credit Union Administration (NCUA).

**Contact Info**

For additional information concerning this or any other issues involving financial institutions and their regulation, please contact your Husch Blackwell attorney.

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